GHAZALI BIN SALLEH & ANOR.

v.

PUBLIC PROSECUTOR

HIGH COURT, TAIPING
DATO' HJ. ABDUL MALIK BIN
HJ. ISHAK JC
[CRIMINAL APPEAL NO. 51-55-92 (89)]
13 JULY 1993

CORRUPTION: Section 4(a) Prevention of Corruption Act 1961 read with s. 34 Penal Code - First accused, a bailiff of Sessions Court, and 2nd accused, a contract watchman in employment of Sessions Court, Taiping - Allegedly received gratification as inducement to expedite processing of petition for Letters of Administration - Whether money referred to was for stamps and process server's expenses - Section 14 of the said Act - Presumption against 2nd accused but not against first accused - Burden of proof.

EVIDENCE: Mini tape recorder to record conversation of meeting - Whether cassette tape admissible - Section 3 Evidence Act 1950 - Mechanical evidence - Cassette tape tendered by prosecution and marked as ID9 but failed to produce - Section 114(g) of Evidence Act - Failure to give reasonable explanation.

ACCOMPLICE: Credibility of complainant - Trial Court did not consider whether complainant was an accomplice - Danger of convicting without corroboration in material particulars - Whether complainant took some more infamous part in the alleged transaction or just giver - Section 133 Evidence Act.

This was an appeal by both the appellants against the conviction and sentence by the Sessions Court, Taiping on 4 March 1989 on a joint charge under s. 4(a) of the Prevention of Corruption Act 1961 read with s. 34 of the Penal Code.

Held:

[1] The complainant was undoubtedly an accomplice in this case and the Court was entitled to presume that he was unworthy of credit unless he was corroborated in material particulars. Unfortunately, the trial Court failed to warn itself of the danger of convicting on the uncorroborated evidence of the complainant. Consequently, the conviction and sentence should be set aside.

[2] A tape recording, just like a photograph, is a document and caught within the meaning of s. 3 of the Evidence Act 1950. As there was no reasonable explanation given for the failure to produce the 31 May 1986 cassette tape, the trial Court should have invoked s. 114(g) of the Evidence Act 1950 against the prosecution for the failure to tender the 31 May 1986 cassette tape.

[3] In rejecting the defence outright, the trial Judge made a general reference to the demeanour of the complainant without particularisation, thereby giving the impression that he was trying to bolster up his verdict. This method was frowned upon by Terrel Ag. CJ in the case of *Rex v. Low Toh Cheng* [1941] MLJ Rep. 1.

[4] The trial Court had failed to test the complainant's evidence against the evidence of the other witnesses before deciding to accept the complainant's evidence as reliable. The Sessions Court Judge had failed to give a reasoned judgment on the facts and the law and his judgment was not a "speaking" judgment, so to speak.

[5] The conviction and sentence of both the appellants were set aside, the fines, if paid, was ordered to be refunded. As the ends of justice did not require that the appellants should be put on trial again, there will be no order of a retrial.

[Appeal allowed. Conviction and sentence on both appellants set aside].

Cases refrred to:

Tengku Mahmood v. Public Prosecutor [1974] 1 MLJ 110 ***(refd)***
Daimon bin Banda v. Public Prosecutor [1953] 19 MLJ 23 ***(refd)***
Abdul Hamid bin Mohamed v. Public Prosecutor [1953] 19 MLJ 26 ***(refd)***
Soosay Das v. Public Prosecutor [1951] 17 MLJ 57 ***(refd)***
Ahmad Shah bin Hashim v. Public Prosecutor [1980] 1 MLJ 77 ***(refd)***
Trowell v. Public Prosecutor [1946] MLJ (FMSR) 41, 42 ***(refd)***
Davies v. Director of Public Prosecutions [1954] All ER Vol. 1 p. 407 ***(refd)***
Rex v. Baskerville [1916] 2 KB 658 ***(refd)***
Gurbachan Singh v. Public Prosecutor [1966] 2 MLJ 125 ***(refd)***
R v. Mills [1962] 3 All ER 298 ***(refd)***
Ng Yan Pee v. PP [1959] 3 MC 249, 253 ***(refd)***
Buxton v. Cumming [1927] 71 Sol. J. 232 ***(refd)***
Public Prosecutor v. Saimin & Ors. [1971] 2 MLJ 16 ***(refd)***

Public Prosecutor v. Lee Pak [1937] MLJ 265 ***(refd)***
Munusamy v. PP [1987] 1 CLJ 250/[1987] 1 MLJ 492 SC ***(refd)***
Syed Abu Bakar bin Ahmad v. Public Prosecutor [1984] 1 CLJ 80/[1984] 2 MLJ 19FC ***(refd)***
Wong Swee Chin v. Public Prosecutor [1981] 1 MLJ 212 FC ***(refd)***
Attan bin Abdul Gani v. PP [1970] 2 MLJ 143 ***(refd)***
PP v. Ng Nee Tiak [1962] 28 MLJ 421 ***(refd)***
Mohd. bin Long v. PP [1972] 1 MLJ 76 ***(refd)***
Balakrishnan v. Deputy Public Prosecutor [1969] 2 MLJ 61 ***(refd)***
PP v. Yuvaraj [1969] 2 MLJ 89 ***(refd)***
Mohamad Radhi v. PP [1991] 3 CLJ 2073/[1992] 2 SCR 145 ***(refd)***
Rex v. Low Toh Cheng [1941] MLJ Rep. 1 ***(foll)***
Murugiah v. Public Prosecutor [1941] MLJ 17 ***(refd)***
Public Prosecutor v. Low Toh Seng [1941] MLJ 1 ***(refd)***
Rex v. Howe (2 MC 109, 110) ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 3, 73(2), 114(g), 133
Penal Code, s. 34
Prevention of Corruption Act 1961 (Revised 1971), ss. 4(a), 14

For the first appellant - Gurbachan Singh; M/s. Bachan & Kartar
For the second appellant - Dalgit Singh; M/s. Gurdev, Dalgit, Su & Co.
For the respondent - Mohd. Jamil bin Hussein

JUDGMENT

Hj. Abdul Malik bin Hj. Ishak JC:
The first appellant, a bailiff of the Sessions Court, Taiping, and the second appellant, a contract watchman in the employment of the Taiping Court, were convicted in the Taiping Sessions Court on 4 March 1989 on a joint charge under s. 4(a) of the Prevention of Corruption Act, 1961 read with s. 34 of the Penal Code for corruptly accepting from one Shahabuddin bin Hj. Ashari for themselves a gratification of cash RM300 as an inducement for doing an act in relation to their principals' affairs, to wit, to expedite the processing of a petition for a Letter of Administration by the said Shahabuddin bin Hj. Ashari to administer the movable asset of the late Hajah Bidah bte Musa, to wit, cash savings of RM21,862.67 with the Chartered Bank, Taiping. The first appellant was sentenced to four (4) months' imprisonment plus a fine of RM3,000 in default four (4) months' imprisonment and the second appellant was sentenced to three (3) months' imprisonment plus a fine of RM3,000 in default four (4) months' imprisonment. A stay of the execution was granted by the Taiping Sessions Court. The appeals of both appellants are against conviction and sentence.

There are numerous grounds of appeal set out in the petitions of appeal on behalf of the appellants but for the purpose of this judgment, it would be sufficient for me to deal only with certain basic issues which struck at the core of the whole case, and which I have observed as either not raised at any stage of the trial or raised but not dealt with in the grounds of judgment of the Taiping Sessions Court.

It is the prosecution case that the complainant (PW5), a graduate teacher by the name of Shahabuddin bin Hj. Ashari, on 10 May 1986 proceeded to Taiping Court to apply for Letters of Administration on behalf of his late mother's estate. On arrival at the Court, the complainant was directed to see the first appellant who obligingly gave him an application form for Letters of Administration (P4). The first appellant told the complainant to see a petition writer to fill up (P4). As soon as the complainant walked out of the Court building, the second appellant approached him and told him that with inside help the application would be processed faster and the complainant must give RM300 to RM400 to the person inside. On leaving the Court's premises, the complainant proceeded to the Badan Pencegah Rasuah's ("BPR") office as he felt that there was a malpractice. At the BPR's office, the complainant met Lim Yong Seng (PW10) ("Lim") who then brought him to see Sapun bin Samsudin (PW9) ("Sapun"). Sapun requested the complainant to go to the Court in a week's time to get further particulars pertaining to the amount he was supposed to pay and the purpose of paying that amount. Sapun requested the complainant to meet the second appellant for this purpose.

On 17 May 1986 the complainant dutifully went to the Court to meet the second appellant and it was on this occasion that the complainant was introduced to the first appellant by the second appellant. It was in evidence, and this was not considered by the Sessions Court, that the complainant came prepared for this meeting. The complainant brought along a mini tape recorder which he

placed in his right trouser pocket. And that according to the complainant, before he alighted from his car (after parking his car in the Court compound), he had switched on the tape. It appears that this mini tape recorder was borrowed by the complainant from his friend by the name of Mohd. Salim bin Mohd. Said. It was in evidence, that it was totally the complainant's idea and not that of the BPR's, in bringing along the mini tape recorder for this meeting. Upon arrival at the Court, the complainant met the second appellant along the corridor of the ground floor of the Court house. Both of them had some discussions and during this discussion, the second appellant told the complainant that if he were to make a personal application for the Letters of Administration, it would take 7 to 8 months and it might even be rejected. At this juncture, the first appellant was seen walking along the corridor of the Court house and the second appellant forthwith took this opportunity, as stated earlier, to introduce the complainant to him. According to the complainant, the first appellant invited him to sit on the bench along the Court corridor and the first appellant then proceeded to explain the procedures for obtaining the Letters of Administration. The first appellant stated that he would expedite the matter and informed the complainant that RM45 was needed for stamp fees to file the application forms. The first appellant also stated that after the forms had been filled the complainant has to pay RM300 to RM400 as demanded by the second appellant. The complainant promised to return next Saturday at about the same time and he then left the Court premises. From there, the complainant proceeded straight to the BPR's office and handed the cassette tape to Lim. Unfortunately, Lim did not play the cassette tape (ID9) for the complainant to hear. The complainant also lodged his report *vide* Ipoh Central report no: 2086/86 at about 11.20 a.m. on the same day (17 May 1986). It appears that this police report was recorded by Lim.

There was an attempt by the prosecution to tender the cassette tape (ID9) but the Sessions Court ruled that it was inadmissible. I shall revert to this later in the course of this judgment.

On 24 May 1986 the complainant, after being briefed by the BPR officers, proceeded to the Court and handed the application form for the Letters of Administration and the estate duty form, to the first appellant. Since the complainant brought along the burial permit of his late mother, it was rejected by the first appellant. The complainant was told by the first appellant to bring the death certificate of his late mother. This was eventually fulfilled by the complainant when he handed the death certificate to Sharin bin Aminuddin (PW3) on 25 May 1986 at about 6.00 p.m. at the Court compound. Sharin, in due course, handed the death certificate to the second appellant. Adverting back to the meeting on 24 May 1986, the complainant again enquired of the first appellant as to the amount he was required to pay. The first appellant then wrote on a yellow stamp pad (P13) the figure 300. The first appellant was reluctant to write details of the money involved as he stated it was entirely a private matter. However, according to the complainant, the first appellant took several forms from his drawer and the first appellant was alleged to have stated that these forms came from the lawyers and they have not been fixed for hearing.

On 30 May 1986 at 2.30 p.m., the complainant attended a briefing at BPR's office in Ipoh, Perak. That briefing was chaired by Sapun and attended by five other BPR officers. The complainant was told to give two kinds of signals. The first signal was by scratching his chin, indicating the presence of the second appellant. The second signal was by scratching his ear, indicating that the money had been handed over to the target. The complainant was told to hand over the money when demanded and not otherwise. Sapun then requested the complainant to meet Lim in the morning of 31 May 1986 at Jalan Merdeka to collect the RM300 marked notes (P15) and the cassette.

Thus, as requested, on the morning of 31 May 1986 the complainant met Lim at Jalan Merdeka and collected the two items from him. From there, at about 9.00 a.m. the complainant proceeded to the Court via the Lake Gardens. After parking his motorcar at the Court compound, the complainant went to locate the second appellant at the verandah of the Court. This proved unsuccessful. The complainant then entered the main office of the Court and there he saw the second appellant seated on a chair. The second appellant requested the complainant to wait and at the

same time pointed to the first accused who was typing a letter. Having completed his typing, the first appellant returned to his seat and waved to the complainant. The complainant then approached the first appellant's table with the second appellant. The first appellant informed the complainant that all the documents had been typed and asked the complainant to sign the letter and the forms. The letter which the complainant signed was addressed to the "Pemungut Duti Harta Pesaka, Jabatan Hasil Dalam Negeri" (P6) and it was stated therein that the number of the application was registered as L.A. 10/86. The first appellant then told the complainant that he could hand the money to the second appellant outside the Court building. Just before the complainant went out of the office, he heard the second appellant enquire of the first appellant whether the money was meant for stamps and whether the second appellant should buy the stamps. To this, the first appellant replied: "not necessary." (This piece of evidence was not considered by the Sessions Court). Once outside the Court building, at the rear of his motorcar, the complainant handed the marked notes RM300 (P15) to the second appellant. The second appellant then placed the money in his shirt pocket. Having done so, the complainant then scratched his ear. According to the complainant he was convinced that if he did not give the money, his application for the Letters of Administration would be delayed. This attitude of his was entirely due to the first appellant's behaviour in showing some files to the complainant and at the same time commenting that those files were delayed since they were not done through the first appellant. The first appellant had also said that if the application was not done through him, it could take 7 to 8 months. But if it was done through him, it would take 3 to 4 months only.

From the Court's compound, the complainant proceeded straight to Jalan Merdeka and met Lim. The complainant handed the cassette tape to Lim and also related what had transpired.

Meanwhile, the second appellant was placed under arrest by Woon Mon Cheong (PW7) ("Woon") as he was about to walk back to the Court. According to Woon, he saw the complainant scratching his chin when the complainant first met the second appellant and when the money was handed over to the second appellant, he also saw the complainant scratching his right ear a few times.

Both Tahir bin Khalid (PW6) ("Tahir") and Woon were detailed to follow the complainant when the latter went to the Court house on 31 May 1986 at about 9.00 a.m. Both admitted that there were no continuous observations of both the appellants. Tahir could see the complainant talking to the second appellant but no evidence was led as to whether he heard their conversation. Woon too stated that he saw the complainant talking to both the accused but there was no evidence that he could hear their conversation.

Tahir placed the first accused under arrest and seized the exhibits and prepared a search list (P16). Among the items seized was a stamp pad (P13) with a figure 300 scribbled on it.

The prosecution also led evidence through the Registrar of the Sessions Court (PW1) in regard to the appointments of both the appellants. The first appellant was a bailiff attached to the Court and was assigned the task of processing the Letters of Administration. The second appellant was a contract watchman of the Taiping Court.

Evidence was also led by the prosecution through the Magistrate (PW2) who was in charge of the handling of applications for the Letters of Administration about the role of the first appellant. She testified that she left the fixing of the dates of hearing of applications for the Letters of Administration entirely to the first appellant and that the first appellant (a mere supposition) could expedite such applications. She further testified that she had no complaints from the members of the public that the first appellant had delayed their applications for Letters of Administration.

After hearing the prosecution case, the Sessions Court ruled that a *prima facie* case was established and accordingly the defence of both appellants were called.

In his defence, the first appellant stated that the complainant became angry on his first visit to the Court because the first appellant did not supply the estate duty affidavit form to him. Both parties scolded each other over this incident.

A week later, the first appellant met the complainant along the Court corridor where the complainant apologised for the earlier incident. The complainant then asked the assistance of the first appellant in order to fill the forms for his application. This was agreed to by the first appellant.

The first appellant deposed that he informed the complainant that the cost of filing the application was RM40 and the process server's expenses was RM5 only.

The first appellant further deposed that on the day of the alleged receipt of the RM300, the complainant had asked him if he could help to buy stamps but the first appellant replied in the negative. As the complainant was about to turn back, the second appellant came near him and the complainant then asked the first appellant whether he (the complainant) could go and buy the stamps with the second appellant, whereupon the first appellant stated that there was nothing wrong in doing so. The first appellant denied demanding the sum of RM300 from the complainant and categorically stated that the moneys he was referring to were in respect of stamps, process server's fees, etc. The first appellant also denied that he wrote the figure 300 on the stamp pad (P13). Under cross-examination, the first appellant denied all the allegations and explained the evidence of the complainant one after another.

In his defence, briefly, the second appellant denied demanding the sum of RM300 from the complainant. He testified that he met the complainant in a casual manner and enquired about his problem when the complainant was in Court and subsequently he introduced the complainant to the first appellant. He did not know that the first appellant was in charge of the Letters of Administration. He stated that he was caught with the marked notes because the complainant handed the money to him solely for the purpose of assisting the complainant to buy stamps.

The cautioned statement of the second appellant (D18) recorded on 31 May 1986 at 11.30 a.m., barely two hours after his arrest, tallied with his evidence in Court, especially that part about accompanying the complainant on 31 May 1986 to buy stamps.

At the outset, in an appeal of this nature, I must consider the following pertinent questions:

Firstly, did the trial Court give adequate consideration to the evidence before it?

Secondly, was the assessment of the complainant's credibility arrived at in a manner this Court ought now, in the circumstances, regard itself as precluded from considering it?

Thirdly, was there microscopic scrutiny and critical appreciation of the totality of the complainant's evidence?

Fourthly, if there was, then the question to ask is this: though the trial Court had the advantage of his having seen and heard the witness, whether his approach to the issue of credibility was so gravely erroneous as to constitute a serious misdirection and consequently make the judgment wholly unsatisfactory?. (per Raja Azlan Shah CJ) (Malaya) (as his Majesty then was) in the case of *Tengku Mahmood v. Public Prosecutor* [1974] 1 MLJ 110).

Mr. Gurbachan Singh, learned Counsel for the first appellant, strenously urged me to hold the complainant an accomplice and he further submitted that there was no where stated in the learned trial Court's judgment to show that he made any finding to show that the complainant was an accomplice. He further submitted, that if the complainant was an accomplice, the trial Court ought to have warned himself of the danger of convicting both the appellants without corroboration. Mr. Dalgit Singh, learned Counsel for the second appellant, adopted in toto the submissions of Mr. Gurbachan Singh and submitted about the danger of convicting both the appellants on the uncorroborated testimony of the complainant. There is nothing novel about this submission. In regard to accomplice's evidence, it is a rule of practice that has the force of law that it is not safe to convict on such evidence unless such evidence is corroborated in material particulars. Nevertheless, the trial Court may, after careful analysis of the evidence, convict if he is satisfied even without corroboration, of the truth of the testimony given by a witness and such evidence is sufficient to establish the guilt of the accused beyond any reasonable doubt.

It is trite law that the trial Court ought, on the material before him, to determine whether a witness is an accomplice.

Encik Mohd. Jamil bin Hussein, the learned deputy public prosecutor, argued with fervour, that firstly, the complainant had not played an "infamous role" in this case; secondly, the complainant made no offer to bribe the appellant; thirdly, the complainant did not play an active part in the transaction; and finally, on the facts of the case, the complainant was not an accomplice and his evidence needed no corroboration.

In *Daimon bin Banda v. Public Prosecutor* [1953] 19 MLJ 23, Foster Sutton CJ speaking for the Court of Appeal in regard to the question of accomplice had this to say:

> The law here is the same as in the United Kingdom. The uncorroborated evidence of an accomplice is admissible in law, but it is the practice for the Judge to direct himself, or the jury, as the case may be, of the the danger of convicting an accused person on the uncorroborated testimony of an accomplice or accomplices. As has often been said, this rule of practice has become virtually equivalent to a rule of law. If, however, after such a direction the Judge or jury convict, the Court of Appeal will not quash the conviction merely upon the ground that the accomplice's testimony was uncorroborated.

Further down the page, his Lordship said:

> We agree with Taylor J., that the effect of the new provision is that, in corruption cases, a person is no longer to be presumed unworthy of credit merely by reason of the fact that he has made, or caused to have made, an improper payment.
>
> If, however, he has taken some more infamous part in the transaction, for example actively corrupted the public officer into accepting the bribe, the new provision does not cover his testimony.

In *Abdul Hamid bin Mohamed v. Public Prosecutor* [1953] 19 MLJ 26, Sir Charles Murray-Aynsley CJ (S) applied *Daimon's* case (*supra*) and said:

> In this case the evidence read in its normal sense clearly indicated that the Police Sergeant took the initiative by demanding the bribes, and it was not the witnesses who, in the first place, offered them. That being so, it seems impossible to say that they were guilty of actively corrupting him, and there are no special circumstances which would bring them within the words "some infamous part" in *Daimon's* case.

Taylor J. in *Soosay Das v. Public Prosecutor* [1951] 17 MLJ 57 held that a person who makes a corrupt payment only under pressure is less seriously discredited than one who does so voluntarily.

Mohamed Azmi J. (as he then was, now a Supreme Court Judge) in *Ahmad Shah bin Hashim v. Public Prosecutor* [1980] 1 MLJ 77, held that although the person who gave the bribes was an accomplice, it was the Accused who solicited the bribe, and therefore that person could not be classified as an accomplice of the first degree, and in any event there was corroboration by documentary and circumstantial evidence.

The cases cited above serve as useful guidelines but I am of the considered view that each case must be looked at on its own facts.

In the instant appeal, the complainant had gone beyond the scope of just being the giver. He had, one week after his nasty encounter with the first appellant, proceeded again to the Court armed with a mini tape recorder (ID9), to purposely obtain incriminating evidence against both the appellants. This idea of bringing the mini tape recorder was entirely that of the complainant. Even the investigating officer expressed alarm at the conduct of the complainant. On 10 May 1986 when the complainant met both the appellants, he thought that there was malpractice, yet he did not lodge any police report when he reported the matter to the BPR. At that point of time, the complainant knew that the second appellant demanded RM300 to RM400 in order to expedite the process of the application for Letters of Administration and that money was meant for the "person inside". The complainant played along with both the appellants and to ensure success he had on his own initiative tape recorded the conversations he had with both the appellants on 17 May 1986. The cassette tape was handed to Lim at the BPR's office that very day on the complainant's return from the Court. This important factor which was in favour of both the appellants was not considered at all by the trial Court. There was total silence in the trial Court's grounds of judgment pertaining to the cassette tape for the 17 May 1986 encounter with

the appellants in the Court house. The absence of any mention of the cassette tape, must, I think, have entirely coloured the trial Court's perspective of the complainant especially in regard to the question of whether the complainant was an accomplice. The complainant was undoubtedly an accomplice in this case and the Court is entitled to presume that he is unworthy of credit unless he is corroborated in material particulars. It is pertinent to point out that although s. 133 of the Evidence Act enacts that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice, yet it was held by Horne J. in the case of *J.H.A. Trowell v. Public Prosecutor* [1946] MLJ (FMSR) 41, 42 that a Magistrate's grounds of decision must show that he "convicted with an appreciation of the danger of so doing". Lord Simonds LC in *Davies v. Director of Public Prosecutions* [1954] All ER Vol. 1 p. 407 gave a stern warning in the following words:

> ... in a criminal trial, where a person who was an accomplice gave evidence on behalf of the prosecution, it was the duty of the judge to warn the jury that, although they might convict on his convict ion, it was dangerous to do so unless it was corroborated; this rule, although a rule of practice now had the force of a rule of Law and where the judge failed to warn the jury in accordance with it, the conviction, would be quashed, even if, in fact, there was ample corroboration of the evidence of the accomplice ...

Unfortunately, the trial Court failed to warn itself of the danger of convicting on the uncorroborated evidence of the complainant. This brings in only one result: the conviction and sentence should be set aside (see *Rex v. Baskerville* [1916] 2 KB 658).

Next, the evidence pertaining to the mini tape recorders. On two occasions, the complainant brought the tape recorders to the Court. On the first occasion (17 May 1986) it was entirely on the initiative of the complainant and on the second occasion (31 May 1986) it was at the behest of the BPR.

A tape recording, just like a photograph, is a document, and is caught within the meaning of s. 3 of the Evidence Act, 1950. A photograph becomes intelligible only after it has gone through a chemical process. In the case of a tape recording there is an imprint on a magnetic tape which becomes intelligible only after it goes through a certain process. The photograph appeals to the eye while the sound recording appeals to the ear.

On the admissibility of a tape-recorded conversation, Yong J. had occasion to decide in *Gurbachan Singh v. Public Prosecutor* [1966] 2 MLJ 125 where his Lordship after referring to *Rex v. Mills* [1962] 3 All ER 298 said:

> It was further submitted by the appellant's counsel that the tape-recorder conversation was inaudible and unintelligible and therefore should be rejected. I myself have personally seen and heard the film and the tape-recorded conversation. They were not as clear as those seen and heard in a first class cinema. The learned President was satisfied with them and I can find no reason to disagree with him.

Whereas in *Ng Yan Pee v. PP* [1959] 3 MC 249, 253, the Court of Appeal upheld the trial Judge's finding that the tape recording did not help one way or the other as there were:

> ... numerous and lengthy lacunae in it representing portions of the tape the contents of which were unintelligible.

It was further held that a tape recording may be admissible as corroborative evidence, provided that it recorded the entire conversation in question and was clearly audible and intelligible.

It appears that mechanical recording had been accepted as evidence by the English as long ago as 1927. In *Buxton v. Cumming* [1927] 71 Sol. J. 232, Swift J. raised the question whether a dictaphone record had ever been accepted in evidence by the Courts, and upon Counsel replying that he did not think so, said that he saw no reason why such a record, in that case the record of an interview, should not be accepted in evidence.

Since the tape-recorded conversation is susceptible to interference, and can be easily altered, there must be evidence to show that it is well guarded. The essence of any safeguard which is at once real and understandable seems to lie in physically guarding the disc or tape as soon as a recording has been made on it; and making sure that it is under guard until it is needed for a lawful occasion or until it is brought to the Court.

Unfortunately, in the instant appeal, the trial Court rejected the cassette tape (ID9) for the 17 May 1986 episode as it was inaudible and unintelligible (see page 34 of the appeal record). Devoid of the cassette tape (ID9), I am unable to arrive at any conclusion as to its weight in relation to the prosecution's case. Be that as it may, there was no attempt whatsoever by the prosecution to tender the cassette tape for the 31 May 1986 episode, a crucial date in relation to the prosecution bearing in mind that the burden of proof remains with the prosecution throughout the trial (see *Public Prosecutor v. Saimin & Ors.* [1971] 2 MLJ 16). Neither was there evidence that Lim guarded the cassette tape for the 31 May 1986 episode to prevent interference and possible alteration. The cassette tape was, however, offered but rejected by the defence at the close of the prosecution case. Nevertheless, the decision whether to tender or not to tender the cassette tape just like whether to call or not to call a witness including a witness from whom a statement has been taken is always the prerogative of the prosecution (see *Public Prosecutor v. Lee Pak* [1937] MLJ 265). The tape-recorded conversation for the 31 May 1986 episode is a material document for the prosecution as it would provide independent corroboration to the version of the complainant. The tape-recorded conversation would certainly shed light as to whether both the appellants demanded the RM300 to expedite the application for the Letters of Administration on 31 May 1986. The BPR officers that accompanied the complainant to the Court on 31 May 1986 merely saw but did not hear the conversation between the parties. Without the cassette tape, the evidence of the complainant was uncorroborated. The defence, on the other hand, maintained throughout the trial that there was no demand for the RM300. All the talk about money was in relation to the payment of stamp duties, etc. It can safely be inferred, that if the cassette tape for the 31 May 1986 episode had been tendered, it would certainly be adverse to the prosecution. There was no reasonable explanation given for the failure to produce the 31 May 1986, cassette tape. The trial Court should have invoked s. 114(g) of the Evidence Act 1950 against the prosecution for the failure to tender the 31 May 1986 cassette tape (see *Munusamy v. PP* [1987] 1 MLJ 492 SC).

A concerted attack was made by the defence that the figure 300 appearing on the stamp pad (P13) was not written by the first appellant. Even the first appellant in his defence denied writing the figure 300 on the stamp pad, so submitted Mr. Gurbachan Singh. The trial Court in his judgment stated that "the first accused wrote the figure 300 on P13". Clearly the trial Court was in error when he took upon himself, in the absence of an expert witness to conclude that the figure 300 appearing on the stamp pad was written by the first appellant. The trial Court should have resorted to s. 73(2) of the Evidence Act, 1950 when the first appellant denied, in his defence under oath, that he wrote the figure 300 (see *Syed Abu Bakar bin Ahmad v. Public Prosecutor* [1984] 2 MLJ 19 FC and *Wong Swee Chin v. Public Prosecutor* [1981] 1 MLJ 212 FC). I took the opportunity of calling for the stamp pad (P13) and noted that it was yellow in colour with brand name "Lihit" and the figure 300 was scribbled in black ball point pen. There were other figures scribbled on the stamp pad like 1028, 8891 (appearing twice), 891 and 45. On the reverse portion of the stamp pad the words: "Mahkamah Rendah Taiping" prominently embossed in six places, indicative that the stamp pad is the property of the Court and not that of the first appellant. Bereft of the evidence of an expert in regard as to who actually wrote the figure 300 on the stamp pad (P13) the figure 300, by necessary inference, could have been written by any member of the Court staff other than the first appellant. Seen in this lights the denial of the first appellant that he did not write the figure 300 on the stamp pad should have been critically scrutinized by the trial Court and be given effect accordingly. Clearly therefore the trial Court had overlooked or failed to take into account or give proper weight to, or draw proper inferences from, the matters crucial to the defence. It is also clear that the trial Court failed to consider entirely the cautioned statement of the second appellant made some 2 hours after his arrest, a piece of cogent corroboration for the second appellant.

Next, in calling for the defence of both the appellants, the trial Court invoked the presumption under s. 14 of the Prevention of Corruption Act, 1961 (Revised 1971) ("PCA"). Clearly, from the available evidence, since the marked notes were found on the person of the

second appellant, the presumption under s. 14 of the PCA would rightly apply against him. But it would certainly not apply to the first appellant. It appears that the trial Court would not have called the first appellant to enter his defence if he did not invoke section 14 of the PCA. There was no reason forwarded by the trial Court as to why s. 14 of the PCA should apply to the first appellant (see *Attan bin Abdul Gani v. PP* [1970] 2 MLJ 143, *PP v. Ng Nee Tiak* [1962[28 MLJ 421, *Mohd. bin Long v. PP* [1972[1 MLJ 76 and *Balakrishnan v. Deputy Public Prosecutors* [1919] 2 MLJ 61 - where it was laid down that in a charge under the PCA, once the prosecution has proved that money has been given or received by an agent and employee of the Government, the burden of proof shifts to the accused to rebut the presumption under s. 14 of the PCA that the money was obtained corruptly or as an inducement or reward for doing an act in relation to the principal's affairs). The accused has to rebut the presumption on the balance of probabilities (*PP v. Yuvaraj* [1969] 2 MLJ 89). On perusal of the judgment of the trial Court, it is apparent that the trial Court had gravely misdirected himself when he imposed a very high, unjustified and unwarranted burden on the defence (*Mohamad Radhi v. PP* [1992] 2 SCR 145).

In rejecting the defence outright, the trial Court made a general reference to the demeanour of the complainant without particularisation, thereby giving the impression that he was trying to bolster up his verdict. This method was frowned upon by Terrel Ag. CJ in the case of *Rex v. Low Toh Cheng* [1941] MLJ Rep l. Having read the judgment of the trial Court, I find that the trial Court did not make any microscopic examination of the totality of the complainant's evidence. He has also failed to test the complainant's evidence against the evidence of the other witnesses before deciding to accept the complainant's evidence as reliable. He has failed to give a reasoned judgment on the facts and the law. His judgment is not a "speaking" judgment, so to speak (see *Murugiah v. Public Prosecutor* [1941] MLJ 17 and *Public Prosecutor v. Low Toh Seng* [1941] MLJ 1). I therefore considered the whole matter afresh and checked by critical and minute examination the whole of the evidence and held that the credibility of the complainant (who had an axe to grind since there was evidence of a quarrel with the first appellant) was highly suspect. The need for the trial Court to treat the complainant's testimony with great suspicion and to test it in its totality with the other available evidence cannot be exaggerated. The failure of the trial Court to microscopically analyse the whole evidence, would amount to a misdirection that struck at the very core of the matter, and in the circumstances, would occasion a failure of justice.

I consider it totally unfair to both the appellants, having regard to the unsatisfactory features of this case to put them to the peril of a retrial. They were alleged to have committed the offences on 31 May 1986, approximately 7 years 2 months ago. Morrison CJ settled once and for all the question of retrial in the case of *Rex v. Howe* (2 MC 109, 110) when he said that:

> I have grave doubt whether the power to order a retrial is intended to be exercised in cases where the prosecution have entirely through their own fault, failed to present their case properly. If I complied with this petition, it looks to me as if I should be ordering that an acquitted person should be tried a second time, only for this reason, that the prosecution had not used all their available armoury in launching the first prosecution.

For the reasons adumbrated above, it is my considered view that the conviction and sentence of both the appellants should be set aside and I so order. The fines, if paid, are to be refunded.

I am of the opinion that the ends of justice do not require that the appellants should be put on trial again. Accordingly, there will therefore be no order of a retrial.